IN THE HIGH COURT OF JUDICATURE FOR
RAJASTHAN
AT JAIPUR BENCH JAIPUR.

**O R D E R**

**S.B. CIVIL WRIT PETITION NO.6872/2006.**

**Sheojilal**
**Vs.**
**District Judge, Bundi and ors.**

Date of Order :: 20/11/2007.

**PRESENT**
**HON'BLE MR.JUSTICE MOHAMMAD RAFIQ**

Shri K.K. Mehrishi Senior Advocate with
Shri Sanjay Mehrishi for the petitioner.
Shri N.K. Maloo for the respondents.

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**Reportable**

Petitioner Sheojilal, elected Sarpanch of Gram Panchayat, Gothara, Tehsil Hindoli, District Bundi has filed this writ petition inter-alia with the prayer that by an appropriate writ, order or direction in the nature thereof, the proceedings of Election Petition No.CM 4/2005, Prabhu Lal Vs. Sheojilal & Others pending in the Court of Additional District Judge No.2, Bundi may be adjudged as being without jurisdiction and the same may be ordered to be quashed and set aside, and the

order dated 28.2.2005 passed by the District Judge, Bundi transferring the proceedings of that petition to the court of Additional District Judge no.2 and the order dated 6.8.2005 passed by the passed by the Additional District Judge rejecting his application filed under Order 7 Rule 11 read with Section 151 CPC; further order dated 11.8.2006 rejecting another application filed to the same effect, may be quashed and set aside and it be declared that the District Judge, Bundi had no authority to transfer the election petition filed by respondent no.3 from his court to that of the Additional District Judge no.2, Bundi.

**2)** Petitioner was declared elected as Sarpanch of Gram Panchayat, Gothara, Tehsil Hindoli, District Bundi on 4.2.2005. The respondent no.3 filed election petition questioning the validity of his election in the Court of District Judge, Bundi on 25.2.2005 in accordance with the provisions of Section 43 of the Rajasthan Panchayati Raj Act, 1994 (for short 'the Act') and Rule 80 of the Rajasthan Panchayati Raj (Election)

Rules, 1994 (for short 'the Rules') inter alia on the ground of corrupt practices were committed by the petitioner and that he made wrong declaration about the date of birth of his fourth child and that he was disqualified as per Section 26 of the Act to contest the election having had fourth child born into his family in the year 1996 after the cut off date i.e. 27.11.1995. The District Judge by order dated 28.2.2005 transferred the aforesaid election petition to the court of Additional District Judge no.2 who vide order dated 30.3.2005 issued notice to the petitioner as well as other non-petitioners. Petitioner filed reply to the election petition on 30.5.2005 accompanied by an application under Order 7 Rule 11 read with Section 151 CPC questioning jurisdiction of the Additional District Judge no.2, Bundi to hear and decide the aforesaid election petition. The matter remained pending for filing written statement/reply by various non-petitioners before the court of Additional District Judge. Petitioner in the meantime filed an application on 21.3.2006 seeking

amendment in the reply/written statement. The learned Additional District Judge by order dated 29.3.2006 framed issues on which date another application was filed by the petitioner under Order 7 Rule 11 read with Section 151 CPC. The learned Additional District Judge vide order dated 11.8.2006 dismissed that application and posted the matter for recording evidence of the election petitioner on 28.8.2006. Questioning the correctness of the aforesaid order apart from various other prayers extracted above, the present writ petition has been filed.

**3)** I have heard Shri K.K. Mehrishi, learned senior advocate for the petitioner and Shri N.K. Maloo, the learned counsel representing the respondent no.3 (original election petitioner).

**4)** Shri K.K. Mehrishi, the learned senior advocate argued that election of the sarpanch could be called in question only in accordance with the provisions of Section 43 of the Act in the prescribed manner by filing a petition before the District Judge having jurisdiction. According to

proviso to sub-section (1) of Section 43 of the Act, the District Judge could for the reasons to be recorded in writing transfer such election petition for hearing and disposal to Civil Judge or Additional Civil Judge (Sr.Div.) subordinate to him. The District Judge, therefore, had no authority in law to transfer the election petition to the Additional District Judge No.2 contrary to the provisions contained in the aforesaid proviso. It was argued that according to Section 32(19) of the Rajasthan General Clauses Act, 1955, the 'District Judge' has been defined to mean the “principal Civil Court” of original jurisdiction of a district constituted for the purpose, but shall not include the High Court in the exercise of its ordinary or extraordinary original Civil jurisdiction. The Additional District Judge, therefore, cannot be included in the term District Judge and proceedings held by that court in the election petition preferred by the respondent no.3 were, therefore, wholly without jurisdiction and liable to be set aside. Shri K.K. Mehrishi referred

to Section 8(1) of the Rajasthan Civil Courts Ordinance, 1950 and argued that the State fixes the number of District Judges to be appointed for whole of the State of Rajasthan and the District Judge, Bundi has been appointed according to the provisions as aforesaid. The Additional District Judge No.2, Bundi having not been appointed pursuant to that provision, cannot be termed as District Judge and as such he is not competent to hear and decide the election petition. Shri K.K. Mehrishi further argued that though sub-section (3) of Section 10 of the Civil Courts Ordinance lays down that any Additional Judge so appointed shall discharge any of the functions of a District Judge which the District Judge may assign to him, and in the discharge of those functions, he shall exercise the same powers as the District Judge. However, power under Section 43 of the Act are exercisable only by the District Judge or in case the District Judge decides for the reasons to be recorded in writing decides to transfer the election petition, by a Civil Judge or Additional Civil Judge (SD)

subordinate to him. Since no power specifically has been reserved in the District Judge to transfer the election petition to the Additional District Judge, such power cannot be read in Section 43 on the analogy that the Additional District Judge being higher in hierarchy than the Civil Judge or Additional Civil Judge (SD), could also hear and decide the election petition. It was argued that since the petitioner raised this issue at the very outset, this issue was required to be decided as preliminary issue. The Additional District Judge has committed an error apparent on the face of record by rejecting the application. Shri K.K. Mehrishi, in support of his arguments, relied on the decisions of this Court in **Narayan Dutt Vs. Ibrahim, RLR 1997(1) 583; Smt. Manju Saini Vs. Smt. Prabhati, WLC (Rajasthan) 1997(1) 466, Badri Prasad & anr. Vs. Additional District Judge, Dholpur & Ors, WLN 1972 471; Kiran Singh & ors. Vs. Chaman Paswan & ors., AIR 1954 SC 340.** Shri K.K. Mehrishi lastly argued that whatever proceedings have been drawn by the learned

Additional District Judge, such proceedings being without jurisdiction are liable to be treated as nullity in law and cannot be saved even by recourse to de facto doctrine. Even if the election petition is now transferred to the competent court, it is liable to be proceeded with further from stage one.

**5)** On the other hand, Shri N.K. Maloo, the learned counsel for the respondent no.3 (original election petitioner) argued that the learned District Judge had all the legal authority in the present case to transfer the election petition to the Additional District Judge by order dated 28.2.2005. The petitioner recorded evidence producing nine witnesses upto 21.3.2006 and the matter was posted for further evidence on 26.4.2006. It was at that stage that this objection was raised in the present petition by filing application on 26.4.2006. Having participated in the proceedings upto that stage without any objection and in spite of the fact that the trial court has given ample opportunity to the petitioner

to adduce his evidence, the petitioner could not be allowed to belatedly raise this objection, Even though the petitioner made the prayer for staying further proceedings in the case, this Court in fact while issuing notice merely directed the trial court not to pronounce the judgment. In those facts, evidence of petitioner was closed and the matter was fixed for final arguments on 5.9.2006. It was further submitted by Shri N.K. Maloo that the government by administrative order passed under Section 39(2) of the Act on 30.12.2005 declared office of the Sarpanch vacant. In view however of the Full Bench judgment of this Court in **Smt.Sameera Bano Vs.State of Rajasthan : 2007(2) WLC 526**, the writ petition of the petitioner was allowed on 26.4.2007 wherein it was held that validity of an election on this ground can be called in question only by an election petition. It was argued that the election petition is not exclusively triable by Civil Judge or Additional Civil Judge (SD) but it can also be tried by the court of Additional District Judge which is a

higher court. No prejudice is thereby going to be caused to the petitioner. It was argued that sub-section (2) of Section 43 of the Act provides that “a petition presented under sub-section (1) shall be heard and disposed of in the prescribed manner and the decision of the Judge thereon shall be final.” Rule 85 of the Rules provides that the procedure provided in the CPC shall apply in hearing of the petition in so far as it can be made applicable. Rule 86 provides that the Judge hearing a petition shall have the same powers and privileges as Judge of a civil court when trying a suit. Rule 89 provides that the District Judge may at any stage of the proceedings withdraw any petition pending in the Court of any Judge subordinate to him and try or dispose of the same; or transfer the same for trial or disposal to the court of any other Judge within his jurisdiction or retransfer the same for trial or disposal to the court from which it was withdrawn. There is therefore no manner of doubt that the District Judge retains the power to transfer the election

petition not only to any Civil Judge or Additional Civil Judge for trial and disposal but also to any other Judge within his jurisdiction including Additional District Judge.

**6)** Shri N.K. Maloo, the learned counsel for the respondent argued that the provisions of Section 43(2) of the Act and Rule 89 of the Rules shall have to be harmoniously construed so as to make the scheme of the enactment workable. It was argued that if interpretation of Section 43 as given by the petitioner is accepted, it would lead to absurd consequences inasmuch as the jurisdiction which would be available to a Civil Judge (SD) or Additional Civil Judge (SD), would not be available to Additional District Judge though the court of the latter is higher in hierarchy. Such an incongruous interpretation cannot be attributed to the legislature. Shri N.K. Maloo also relied on the judgment of this Court in **Smt.Veena Lodha Vs. Narendra Mal Lodha : 1976 RLW** 383 and argued that similar objection raised in that case about transfer of a divorce petition on the ground that

Section 19 of the Hindu Marriage Act merely empowered the District Judge to hear and decide such petition was rejected by this Court on the basis of provisions contained in Section 10(3) of the Rajasthan Civil Court Ordinance, 1950 which empowers the District Judge to do so.

**7)** Lastly, Shri N.K. Maloo, the learned counsel for the respondent no.2 argued that even though he contests the correctness of the arguments made by the petitioner, but even if it is now decided to transfer the election petition to any other court, the proceedings should be directed to be resumed from the stage it is transferred to such court as has been provided by sub-rule (2) of rule 89 of the rules of 1994 because the entire proceedings thus far held are liable to be saved by recourse to de facto doctrine. Shri N.K. Maloo, learned counsel for the respondent No.2 relied on judgments of the Hon'ble Supreme Court on the *De facto doctrine*. Shri N.K. Maloo learned counsel in support of the argument relied on the judgments of the Supreme Court in **Pushpadevi M. Jatia Vs. M.L.**

**Wadhawan, (1987) 3 SCC 367, Beopar Sahayak (P) Ltd. Vs. Vishwa Nath, (1987) 3 SCC 693 and Gokaraju Rangaraju Vs. State of AP, (1987) 3 SCC 132.** It was therefore prayed that the writ petition be dismissed.

**8)** Shri K.K. Mehrishi however citied judgment of the Hon'ble Supreme Court in Kiran Singh, supra, to meet the arguments of de facto doctrine advanced by the learned counsel for the respondents and argued that it has been held in that judgment that a decree passed by a court, which would have had no jurisdiction to hear a suit or appeal but for over-valuation or under-valuation is not to be treated as valid and would be null and void and an objection to jurisdiction based on over-valuation or under-valuation, should be dealt with under section 11 of the Suits Valuation Act and not otherwise.

**9)** I have given my anxious consideration to the rival submissions and perused the materials on record.

**10)** Question, identical to the one, which has

been raised in the present matter came up for consideration of this Court in Narayan Dutt (supra) where a somewhat similar provision contained in Section 40 of the Rajasthan Municipalities Act, 1959 was called in for interpretation of this Court. Section 40 of the said Act reads as under :-

> “40.Who shall hear petition: (1) An election petition may be presented to, and shall be heard by, the District Judge having jurisdiction over the area in which the municipal office is situated:
>
> Provided that where an election petition is presented as aforesaid to a District Judge, he may for reasons to be recorded in writing transfer the same for hearing and disposal to an Additional District Judge Sub-ordinate to him.
>
> (2) The District Judge or Additional District Judge by whom it is heard in accordance with the provisions of sub-section (1) is hereinafter referred to as the Judge.”

Sub-section (1) of Section 40(supra) makes it abundantly clear that an election petition can be presented to and shall be heard by the District Judge having jurisdiction over the area and where an election petition is presented as aforesaid to a District Judge, he may for reasons to be recorded in writing transfer the same for hearing and

disposal to an Additional District Judge sub-ordinate to him. In order to have the two provisions compared, it would be useful to also reproduce the provisions of Section 43 of the Act in the present case, which runs as under:-

> "Sec.43. Determination of dispute as to elections.-(1) An election under this Act or the rules made thereunder may be called in question by any candidate at such election by presenting in the prescribed manner to the District Judge having jurisdiction a petition in this behalf on the prescribed grounds and within the prescribed period :
>
> Provided that an election petition presented as aforesaid may, for the reasons to be recorded in writing, be transferred by the District Judge for hearing and disposal to a Civil Judge or Additional Civil Judge (Senior Division) subordinate to him.
>
> (2) A petition presented under Sub-Sec. (1) shall be heard and disposed of in the prescribed manner and the decision of the Judge thereon shall be final."

Proviso to sub-section (1) of Section 43 (supra) however, cannot be said to be similarly worded where the election petition can be presented to the District Judge only and thereupon he could, by virtue of proviso thereto, for the reasons to be recorded in writing, transfer such election

petition for hearing and disposal to the Civil Judge or Additional Civil Judge (SD) subordinate to him. This Court in Narayan Dutt (supra) rightly held that District Judge hearing election petition under Section 40 of the Act is not 'persona designata' but acts in the capacity of office of District Judge, therefore his court is subordinate to High court and revision against his order lies under section 115 CPC. In another cited case of Smt.Veena Lodha, supra, it has been held that the proceedings under the Hindu Marriage Act are to be initiated before the District Judge, but once the petition for divorce is entertained by him, it is certainly open to the District Judge to assign or transfer the proceedings for divorce of marriage in accordance with the provisions of Section 10(3) of the Rajasthan Civil Courts Ordinance (VII) of 1950 because the powers to assign or transfer the proceedings are in no way curtailed by the Hindu Marriage Act. As a necessary corollary, the proceedings under the Hindu Marriage Act can be tried by the Additional District Judge on proper

assignment of the same under Section 10(3) of the Rajasthan Civil Courts Ordinance (VII) of 1950. However, in the present case, though the election petition was transferred by the District Judge to the Additional District Judge and election petitioner adduced his entire evidence but when the matter came up for evidence of the petitioner (the elected Sarparnch), he filed an application questioning jurisdiction of the Additional District Judge to try, hear and decide the matter.

**11)** Question though to be answered is whether proceedings thus far conducted by the Additional District Judge can be said to be completely without jurisdiction and termed as nullity in law and whether such proceedings are liable to be saved by recourse to the *De facto doctrine*? Their Lordships of the Supreme Court in Pushpadevi M. Jatia, supra, while dealing with the provisions of Section 40 of the Foreign Exchange Regulation Act, 1973 held that even if the officer appointed on ad hoc basis but discharging his duties and functions as such at the time of recording statements was ultimately held to

be not competent to do so, validity of his acts cannot be questioned because he was clothed with the insignia of the office while exercising its powers and functions. The official acts of such person are recognised as valid under the *De facto doctrine*, born of necessity and public policy to prevent needless confusion and endless mischief in the interest of public. In Beopar Sahayak (P) Ltd., supra, also a similar question came up for consideration of their Lordships wherein the appointment of the prescribed authority was not held as *persona designata* but he exercised the powers of incumbent of that office. The powers of the prescribed authority by reason of his posting as Additional City Magistrate II, Kanpur, in place of his predecessor and by virtue of an earlier notification of the Government dated September 9, 1974 constituting the Additional City Magistrate II, Kanpur as the prescribed authority for certain area in Kanpur city. That notification was a general notification and, therefore, whoever came to be posted as Additional City Magistrate,

automatically become a prescribed authority. Even if the person appointed as prescribed authority was not fully qualified to act as such and pass the order of release, the validity and legality of the order of release passed by him cannot be impugned because of the de facto doctrine inasmuch as he had not held the office as an usurper but only under colour of lawful authority. In Gokaraju Rangaraju, supra, the Hon'ble Supreme Court held that the judgments and decrees made by a de facto judge under colour of lawful authority has the same effect as that made by a de jure judge so even if the appointment of a judge is found to be invalid, the judgments, decrees or orders made by him would continue to be valid and effective. Besides, his actions cannot be impugned collaterally.

**12)** If eventually, this Court were to uphold the aforementioned argument of the petitioner, proceeding thus for held by the Court of Additional District Judge would in any case be liable to be saved by recourse to *de facto doctrine.* But, in my considered view, *De facto doctrine* would not be

required to be invoked in the instant case because on appreciation of the rival submissions, I propose to decide this matter on consideration of the other legal arguments.

**13)** Distinction that I have noticed between Section 43 of the Rajasthan Panchayati Raj Act and Section 40 of the Rajasthan Municipalities Act apart, it is evident from a dispassionate reading of section 43 of the Act that sub-section (1) thereof lays down that an election under this Act or the rules made the under may be called in question by any candidate at such election by presenting in the prescribed manner to the District Judge having jurisdiction a petition in this behalf on the prescribed grounds and within the prescribed period. Proviso to sub-section (1) of Section 43 of the Act of 1994 however empowers the District Judge that he may, for the reasons to be recorded in writing, transfer such election petition for hearing and disposal to a Civil Judge or Additional Civil Judge (SD) subordinate to him. The Rajasthan Civil Courts Ordinance was promulgated by the

Rajpramukh of the State on 24.1.1950 in exercise of powers conferred on him by clause (3) of Article X of the Covenant of 1949. Ordinance promulgated by the Rajpramukh as aforesaid would by virtue of Article 372 of the Constitution have the same force of law as enacted by the State Legislature till replaced by another legislation on the subject. Provisions contained in Chapter II of the Ordinance would be relevant for deciding the controversy involved in the present case. Section 6 thereof, provides for classes of courts namely, (1) the court of District Judge, (2) the special civil court (3) the court of Civil Judge and (4) the Court of the Munsiff. Section 7 confers power upon the State Government to fix and alter the local limits of jurisdiction of any Civil Court by notification in the official gazette. Section 8 confers power upon the State Government to fix number of District Judges and from time to time, alter number of District Judge to be appointed for the whole of the State of Rajasthan. Section 9 (1) provides that appointments of persons to be, and

the posting and promotion, of District Judges, shall be made by the Governor in consultation with the High Court. Section 10 which is relevant for deciding the controversy involved in the present case, runs as under :

> "10. Additional Judges.- (1) When the business pending before any District Judge or District Judges so requires for its speedy disposal, the State Government may, upon the recommendation of the High Court sanction the appointment of such number of Additional Judges for the Court or Courts of such District Judge or District Judges, as may be necessary.
> (2) The provisions of section 9 shall apply also to the appointment, posting and promotion of, and filling up of vacancies among Additional Judges.
> (3) Any Additional Judge so appointed shall discharge any of the functions of a District Judge which the District Judge may assign to him, and in the discharge of those functions, he shall exercise the same powers as the District Judge."

The aforesaid provision came up for consideration of this Court in **Smt.Pushpa Devi Vs. Radhey Shyam : AIR 1972 Raj. 260**, wherein somewhat similar objection was raised in respect of a petition for divorce filed at the instance of husband under Section 13(1) of the Hindu Marriage

Act presented before the District Judge. In that case too, the argument was founded on the premise that since Section 19 of the Act provides that every petition under this Act shall be presented to the District Court within the local limits of whose ordinary civil jurisdiction the marriage was solemnised or the husband and wife reside or last resided together, divorce petition could not be transferred to Additional District Judge for trial and disposal. This court held that once the petition was presented to the District Judge who transferred the same to Additional District Judge, the letter is competent to exercise all the functions which are exercisable by the District Judge. This judgment was later followed and reiterated in Smt. Veema Lodha (supra).

**14)** In **Sarojani Devi Vs. Gulab Chand, RLR 1990 (2) 411**, it was held by this Court that Section 10 of the Ordinance empowers the Additional District Judge to exercise same powers as District Judge and the High Court directed that entire suit property shall vest in the trustee to be appointed by the

District Judge and the defendants were directed to deliver the property to the trustee so appointed. Though the plaintiffs filed an application for execution before the District Judge, Bharatpur accompanied by an application for appointment of trustees as directed by the Court, the District Judge Bharatpur transferred the execution application to the court of Additional District Judge, Gangapur City. In Central Talkies Ltd, Kanpur Vs. Dwarka Prasad, their Lordships of the Supreme Court held that *persona designata* is a person who is pointed out or described as an individual as opposed to a person ascertained as a member of a class or as filling a particular character; *persona designata* are persons selected to act in their private capacity as Judges.

**15)** I have respectfully studied the judgment of the Co-ordinate Bench in Narayan Dutt (supra) and I find myself unable to apply the ratio of that judgment on given facts in the present case not only because of the distinction between Section 40 of the Municipality Act and Section 43 of the

Panchayati Raj Act but also for the reason that Section 10 of the Civil Courts Ordinance and its effect was not at all considered in that judgment.

In view of the above discussion, I do not find any merit in the writ petition. The writ petition is dismissed though with no order as to costs.

**(MOHAMMAD RAFIQ), J.**

Skant/-